

This Opinion is Not a  
Precedent of the TTAB

Mailed: January 22, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Unanimous Media LLC*  
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Serial No. 97529322  
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Kristen Ruisi of Venable LLP  
for Unanimous Media LLC

Danielle Anderson, Trademark Examining Attorney, Law Office 113,  
Myriah Habeeb, Managing Attorney

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Before Kuhlke, Heasley and Brock,  
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Unanimous Media LLC (“Applicant”) seeks registration on the Principal Register



for the mark (PUBLISHING disclaimed) shown below for services identified as “Book publishing; Publishing of books, e-books and audio books,” in International Class 41.<sup>1</sup>

<sup>1</sup> Application Serial No. 97529322, filed on August 1, 2022 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging an intention to use the mark in commerce.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) as likely to cause confusion with the registered mark UNANIMOUS GAMES (GAMES disclaimed) in standard characters for "Arranging and conducting e-sports competitions; entertainment in the nature of e-sports competitions; entertainment services in the nature of development, creation, production and post-production services of multimedia entertainment content; e-sports education services, namely, training in the field of e-sports; training in the field of computerized sports competitions; training in the field of mobile game development; providing e-sports education courses, namely providing on-line courses in the field of e-sports; providing on-line courses in the field of new technology integrations in esports," in International Class 41.<sup>2</sup>

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request, the appeal resumed and briefs were filed. We affirm the refusal to register.

#### I. Evidentiary Issue

The objection to Applicant's listing of two third-party registrations in Applicant's Response to Office Action and Request for Reconsideration is sustained. *In re Peace Love World Live, LLC*, Serial No. 86705287, 2018 WL 3570240, at \*6, n.17 (TTAB

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During examination, Applicant filed an Amendment to Allege Use for which the Examining Attorney requested information. In response, Applicant amended the application back to intent to use under Section 1(b). The mark is described as "The mark consists of a square with three sections, the top left section is a square contains a stylized 'U' formed from seven lines, the top right section is a square contains a stylized design of an open book, and the bottom is a rectangle containing the stylized stacked words 'UNANIMOUS PUBLISHING'."

<sup>2</sup> Registration No. 6642666, filed on December 7, 2020, issued on February 15, 2022.

2018); *In re Star Belly Stitcher, Inc.*, Serial No. 85247730, 2013 WL 4635976, at \*6 (TTAB 2013) (to make third-party registrations of record, copies or the electronic equivalent from the USPTO's databases of registrations must be submitted). In addition, the submission of third-party registrations with Applicant's appeal brief is untimely and they have not been considered. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) ("The record in the application should be complete prior to the filing of an appeal."); *In re Fiat Group Marketing & Corporate Communications S.p.A.*, Serial No. 79099154, 2014 WL 721511, at \*4 (TTAB 2014) (examining attorney's objection to applicant's submission of registrations with appeal brief sustained).<sup>3</sup>

## II. Likelihood of Confusion

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357,

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<sup>3</sup> To introduce evidence after an appeal has been filed, an applicant may file a request for remand under separate cover. Trademark Rule 2.142(d)(1), 37 C.F.R. § 2.142(d)(1). We add that consideration of the materials Applicant attached to the appeal brief would not change the determination in this proceeding as they are not sufficient to establish that the word UNANIMOUS is weak in the relevant field.

As part of an internal Board pilot citation program, the citation form in this opinion follows the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites the Westlaw legal database.

Citations to TTABVUE throughout the decision are to the Board's public online database that contains the appeal file, available on the USPTO website, [www.USPTO.gov](http://www.USPTO.gov). The first number represents the docket number in the TTABVUE electronic case file and the second represents the page number(s).

1361 (CCPA 1973) (“*DuPont*”). See also *In re Majestic Distilling Co.*, 315 F.3d 1311 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. See *In re Chatam Int’l Inc.*, 380 F.3d 1340, 1341-42 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”); see also *In re i.am.symbolic, LLC*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all [*DuPont*] factors for which there is record evidence but ‘may focus . . . on dispositive factors, such as similarity of the marks and relatedness of the goods [or services].’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65 (Fed. Cir. 2002)).

#### A. Similarity/Dissimilarity of the Marks

We compare the marks in their entireties as to “appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (quoting *DuPont*, 476 F.2d at 1361). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*, Serial No. 87075988, 2018 WL 2734893, at \*5 (TTAB 2018), *aff’d mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, Serial No. 85497617, 2014 WL 2531200, at \*2 (TTAB 2014)).

Applicant's and Registrant's marks share the identical word UNANIMOUS combined with a merely descriptive or generic word. In Applicant's mark the additional word PUBLISHING is disclaimed because it is the generic word for the publishing services. Disclaimed matter that is descriptive of or generic for a party's goods and/or services is typically less significant or less dominant when comparing marks. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1305 (Fed. Cir. 2018) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997)). The U logo is the first letter of the word UNANIMOUS, and the book design underscores the services, book publishing. The square/rectangular formation simply serves as a carrier for the wording and design. Taken as a whole, the most memorable element for source identification in Applicant's mark is the word UNANIMOUS.

With regard to Registrant's mark, the disclaimed word GAMES is generic for the various game services. So again, the most memorable source-identifying element in Registrant's mark is the word UNANIMOUS. Thus, the most dominant part of the respective marks is the identical word UNANIMOUS. We add that Registrant's mark is in standard characters and may be presented in the same or similar font and placement as Applicant's mark (excluding the design elements and other wording). *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 1353 (Fed. Cir. 2011) (we must take into consideration all possible representations of standard character marks in our analysis).

Applicant argues that taken as a whole, the marks are different and other elements in its mark prevent likely confusion.<sup>4</sup> Applicant specifically points to the U design, noting it is already registered, and asserts consumers will recognize that portion of Applicant's mark as a source identifier for Applicant's services and thus "dispel any confusion likely in the marketplace." App. Brief, 6 TTABVue 11. However, as the word UNANIMOUS appears in the mark directly below the U design, consumers familiar with Applicant's U design will view it here as a design of the first letter in the word UNANIMOUS, as will consumers not familiar with Applicant's U design. In both cases, consumers would be likely to confuse Applicant's mark with Registrant's mark, either by reverse confusion (consumer's mistaking Registrant's mark for Applicant's mark) or forward confusion (consumers mistaking Applicant's mark for Registrant's mark).

Taking the marks in their entirety, the word PUBLISHING and the book design add to the connotation of Applicant's mark and the addition of the word GAMES adds to the connotation of Registrant's mark, which give the marks some difference in connotation. However, given the dominance of the word UNANIMOUS in both marks

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<sup>4</sup> Applicant's argument that the word UNANIMOUS is weak is not supported by evidence. Even considering the two mentioned registrations, they are few in number and are for differing services. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015). Generally, the existence of third-party registrations cannot justify the registration of another mark that is so similar to a previously registered mark as to create a likelihood of confusion, or to cause mistake, or to deceive. *E.g., Lam.symbolic*, 866 F.3d at 1328; *In re Max Cap. Grp. Ltd.*, Serial No. 77186166, 2010 WL 22358, at \*6 (TTAB 2010). Previous decisions by examining attorneys in approving other marks are without evidentiary value and are not binding on the agency or the Trademark Trial and Appeal Board. *In re USA Warriors Ice Hockey Program, Inc.*, Serial No. 86489116, 2017 WL 2572815, at \*4 n.10 (TTAB 2017).

we find this similarity outweighs the differences, and the disclaimed wording PUBLISHING and GAMES would be viewed as describing different aspects of the services from a single source. *See In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (one feature of a mark may be more significant or dominant in creating a commercial impression); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985).

In view thereof, the similarity of the marks weighs strongly in favor of a likelihood of confusion.

B. Relatedness of the Services, Trade Channels, Classes of Consumers and Conditions of Sale

When considering the services, trade channels, classes of consumers and conditions of sale, we must make our determinations based on the services as they are identified in the application and cited registration. *See Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990). The issue is not whether the services will be confused with each other, but rather whether the public will be confused as to their source. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000) (“[E]ven if the goods [or services] in question are different from, and thus not related to, one another in kind, the same goods [or services] can be related in the mind of the consuming public as to the origin of the goods [or services].”).

The Examining Attorney presented evidence showing Applicant’s type of services, “book publishing; publishing of books, e-books and audio books”, and Registrant’s type of services, in the nature of “development, creation, production and post-

production services of multimedia entertainment content” and e-sport gaming services, used or registered under the same mark.

The representative examples of third-party use, as highlighted by the Examining Attorney in the brief, showing book publishing and development of multimedia entertainment content under a single mark, are set forth below:

- PlayTy Multimedia and Publishing (book publishing services and video production services) May 25, 2023 Office Action, TSDR pp. 5-6;
- Walden Media (specializes in entertainment for the whole family including creating movies, books and television series) May 25, 2023 Office Action, TSDR pp. 7;
- Smithsonian (book publishing and creation of television shows and podcasts) May 25, 2023 Office Action TSDR pp. 8-9;
- Disney (book publishing and creation of television shows and podcasts) February 6, 2024, TSDR 2-6;
- HarperCollins (book publishing and production of tv, film and interactive projects adapted from books, including video/computer games) February 6, 2024, TSDR pp. 7-9;
- Salem Media Group (book publishing and creation of various entertainment content including radio and podcast shows) February 6, 2024 Office Action, TSDR p. 23);
- Scholastic (book publishing and development and creation of live-action and animated series and feature films) February 6, 2024 Office Action, TSDR p. 24-25;
- Mattel (entertainment company launching book publishing platform and partnering with video game developer to create series of video games) June 2, 2024 Denial Request for Reconsideration, TSDR p. 2.

These examples of screen captures from third-party websites show the book publishing and multimedia development services at issue marketed and sold under a



single trademark in the same trade channel and offered to the same classes of consumers. It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of services within a particular class in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, Opposition No. 91196527, 2014 WL 1827031 (TTAB 2014). Applicant's argument that the subject matter for the respective services is different is not persuasive with regard to Registrant's multimedia services because they are not limited by subject matter to esports. As written, the multimedia services are separated from the other services by a semi-colon. *In re Midwest Gaming & Entm't LLC*, Serial No. 85111552, 2013 WL 1442237, at \*4 (TTAB 2013) (finding that, because a semicolon separated the two relevant clauses in registrant's identification, its "restaurant and bar services" is a discrete category of services that stands alone and independently as a basis for likelihood-of-confusion analysis, and is not connected to nor dependent on the services set out on the other side of the semicolon).

In addition, Applicant's arguments centered on Applicant's and Registrant's actual use in commerce are not persuasive. We must make our determination based on the identification in the registration, not based on the registrant's actual use as shown through extrinsic evidence. *Detroit Athletic*, 903 F.3d at 1307; *Stone Lion*, 746 F.3d at 1323 (Board must give full sweep to an identification of goods [or services] regardless of registrant's actual business). A registration enjoys presumptions under

Section 7, 15 U.S.C. § 1057, including coverage for the full scope of its services as identified in the registration.

As to the sophistication of the shared consumers, Applicant argues, without evidence, that esports enthusiasts and professional talent are sophisticated consumers. Registrant's development of multimedia content services is not limited to esports. In addition, the services are available to all potential consumers of multimedia content or esports, from enthusiasts to first time consumers and we must make our determination upon the least sophisticated potential purchaser. *In re FCA US LLC*, Serial No. 85650654, 2018 WL 1756431, at \*10 (TTAB 2018) (citing *Stone Lion*, 746 F.3d. at 1325), *aff'd per curiam*, 777 F. App'x 516 (Fed. Cir. 2019).

Moreover, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *See, e.g., In re Charger Ventures LLC*, 64 F.4th 1375, 1383 (Fed. Cir. 2023); *Stone Lion*, 746 F.3d. at 1325.

In view thereof, these factors weigh in favor of likely confusion.

### C. Actual Confusion

Applicant argues that there have been no instances of actual confusion, and that Applicant and Registrant "have been coexisting in the marketplace for years without any evidence of actual confusion ..." App. Brief, 6 TTABVUE 15. Applicant asserts it has been using its mark "since at least 2021" and "Registrant has been using" its mark since 2022.

The instant application is filed based on an intention to use the mark in commerce under §1(b) of the Trademark Act and, while Applicant submitted printouts from Applicant's website, there is nothing else to indicate if there has been meaningful overlap with Registrant's use. Furthermore, even if Applicant has been using the applied-for mark for the last two years without any evidence of actual confusion, that is a relatively short period of time, which is not particularly persuasive. Last, it is well settled that the relevant test is likelihood of confusion, not actual confusion; thus, it is unnecessary to show actual confusion to establish likelihood of confusion. *See Detroit Athletic*, 903 F.3d at 1309; *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372 (Fed. Cir. 2018); *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002); *Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 1549 (Fed. Cir. 1990). "This is particularly true in the context of an *ex parte* proceeding. Likelihood of confusion in this context can be established even in the face of evidence suggesting that the consuming public was not actually confused." *Detroit Athletic*, 903 F.3d at 1309 (citing *Majestic Distilling*, 315 F.3d at 1317) ("The lack of evidence of actual confusion carries little weight, especially in an *ex parte* context." (citation omitted)). Thus, contrary to Applicant's assertions, Applicant's claim of a lack of actual confusion has been considered, but does not weigh in favor of registration.

#### D. Conclusion

In sum, the similarity of the marks weighs strongly in favor of likely confusion. The relatedness of the services, overlap in trade channels and classes of consumers also weigh in favor of likely confusion. The remaining factors are neutral. In view



thereof, we hold that confusion is likely between Applicant's mark and Registrant's mark UNANIMOUS GAMES.

**Decision:** The refusal to register Applicant's mark under Trademark Act Section 2(d) is affirmed.